APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5262

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HONORABLE ALCEE L. HASTINGS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

No. 82-5715

IN RE:

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE IN AND FOR
THE SOUTHERN DISTRICT OF FLORIDA,

Petitioner.

Petition for Writs of Mandamus and Prohibition

(July 12, 1982)

Before VANCE and ANDERSON, Circuit Judges, and
ALLGOOD*, District Judge.

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*The Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

VANCE, Circuit Judge:

In this case we are asked to decide whether an active federal judge can be subject to federal criminal prosecution for acts involving the exercise of his judicial authority. Appellant and petitioner in this case, Alcee L. Hastings, has served as a federal judge for the United States District Court for the Southern District of Florida since 1979.[1] On December 29, 1981 the federal grand jury in the southern district of Florida returned a four-count indictment against Hastings and William A. Borders, Jr. The indictment alleges that Hastings and Borders, an attorney from Washington, D.C., solicited and accepted a bribe from an undercover agent who was posing as a criminal defendant in a case that had been before Judge Hastings. The bribe was allegedly given in return for Hastings' agreement to reduce that defendant's prison sentence and to revoke an order that the defendant forfeit certain property. Hastings is charged in two counts of the indictment with conspiracy and obstruction of justice.[2]

The trial of Hastings and his codefendant, Borders, was scheduled to commence on March 22, 1982. On February 1, 1982, however, Hastings moved to quash the indictment. He argued that a federal district court does not have jurisdiction over the criminal prosecution of an active federal judge before

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[1]Judge Hastings was sworn into office on November 13, 1979.

[2]Specifically, appellant is charged with conspiracy to solicit and accept money in return for unlawful influence in the performance of lawful government functions in violation of 18 U.S.C. § 371, and with corruptly impeding due administration of justice in violation of 18 U.S.C. §§ 2 and 1503.

We note that appellant has voluntarily removed himself from his normal duties as judge during the pendency of the trial.

he is removed from office through the impeachment process. The trial judge denied the motion on February 17, 1982.[3]

Hastings filed an interlocutory appeal of the district court's order with this court. In order to ensure that the court of appeals had jurisdiction to hear the issues raised in the interlocutory appeal, Hastings also filed an application for writs of mandamus and prohibition with this court on June 17, 1982. We have consolidated the appeal and the application in this case. For reasons that appear below, we conclude that this court has jurisdiction to hear the interlocutory appeal and we therefore deny the application for writs without further discussion. *See Helstoski v. Meanor*, 442 U.S. 500, 506 (1979); *United States v. Denson*, 603 F.2d 1143, 1147 n.2 (5th Cir. 1979) (en banc); *National Equipment Rental, Ltd. v. Mercury Typesetting Co.*, 323 F.2d 784, 786 (2d Cir. 1963). We also conclude that the district court properly denied Hastings' motion to quash the indictment.

I. Jurisdiction of the Court of Appeals

As an initial matter, the government challenges our jurisdiction to hear this interlocutory appeal. Courts will hear a non-certified interlocutory appeal only if the subject of the appeal is a collateral matter that could not be reviewed effectively on appeal from final judgment. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Supreme Court has held that

[3]On March 2, 1982 the district court granted the motion of appellant's codefendant, Borders, for change of venue to the northern district of Georgia. Borders was convicted after trial by jury on May 7, 1982. He has appealed his conviction to this court. No. 82-8302 (appeal docketed May 20, 1982). The venue for the trial of appellant remains in the southern district of Florida.

an interlocutory appeal from the denial of a motion to quash an indictment comes within the *Cohen* exception to the final judgment rule only when the right asserted by the criminal defendant would be irreparably lost if he were forced to undergo trial. *E.g., Helstoski v. Meanor,* 442 U.S. at 506-08 (interlocutory appeal on speech or debate clause grounds permissible); *Abney v. United States,* 431 U.S. 651, 660-62 (1977) (interlocutory appeal on double jeopardy grounds permissible); *see United States v. MacDonald,* 435 U.S. 850, 860 (1978) (interlocutory appeal on speedy trial grounds not allowed); *United States v. Gregory,* 656 F.2d 1132, 1134-35 (5th Cir. 1981) (interlocutory appeal on vindictive prosecution grounds not allowed).

In this case, appellant contends that as an active federal judge he has an absolute right not to be tried in a federal court unless and until he is impeached and convicted by Congress. Like the right secured by the speech or debate clause in *Helstoski* or the right secured by the double jeopardy clause in *Abney,* the right asserted by Hastings is the freedom from the obligation to endure a criminal trial which would be wholly deprived of meaning if he were forced to undergo trial before he could assert it. *See United States v. Brizendine,* 659 F.2d 215, 219 (D.C. Cir. 1981).

The government seeks to distinguish *Abney* and *Helstoski* on the ground that the rights asserted in those cases were based upon specific provisions in the Constitution while the right asserted by Hastings is based upon general principles of separation of powers. The government argues, in effect, that unless the right asserted by the criminal defendant is one that has a positive and well established basis in the law, the court of appeals should not exercise jurisdiction over the interlocutory appeal.

We do not accept the government's argument. Even though this appeal involves rights not heretofore recognized in our

jurisprudence, the assertion of those rights involves significant issues of interbranch comity and separation of powers, the resolution of which is at least the subject of fair debate. *See United States v. Myers*, 635 F.2d 932, 935-36 (2d Cir.) (congressman may challenge prosecution on separation of powers grounds on interlocutory appeal), *cert. denied*, 449 U.S. 956 (1980).[4] These issues have yet to be resolved definitively by the Supreme Court or by this circuit. *Cf. Fountain v. Metropolitan Atlanta Rapid Transit Authority*, 678 F.2d 1038, 1042 (11th Cir. 1982) (claim based upon federal law is not frivolous where, *inter alia*, no controlling authority negates the claim).

For these reasons, we believe it is both necessary and appropriate for this court to consider the existence of Hastings' asserted right to be free from prosecution before that assertion is rendered meaningless by the impending trial.[5]

II. The Motion to Quash the Indictment

Appellant's motion to quash the indictment rests upon two contentions: first, that Congress has the exclusive primary jurisdiction to try and punish a federal judge for high crimes and

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[4] We also note that under the procedure in *United States v. Dunbar*, 611 F.2d 985, 987-89 (5th Cir. 1980) (en banc), the trial court could have determined that the issues raised by Hastings were frivolous and then proceeded to trial without awaiting the determination of the court of appeals. Instead, the trial judge gave serious consideration to the legal points raised by the motion and has refrained from commencing trial pending the outcome of this appeal.

[5] We do not decide in this case whether the assertion of a right of freedom from the obligation to endure criminal trial which involves issues of lesser constitutional magnitude or which has a less tenable basis in existing law would warrant an interlocutory appeal. *See United States v. Myers*, 635 F.2d 932, 936 (2d Cir.) (balancing weight of right asserted against traditional concerns of judicial efficiency which prohibit interlocutory appeals), *cert. denied*, 449 U.S. 956 (1980).

misdemeanors through the impeachment process;[6] and second, that the principle of separation of powers prohibits the executive branch from seeking to prosecute an active federal judge for acts committed in his official capacity.

This Republic is fortunate that in its long history the federal courts have had only one previous occasion to address the constitutional problems posed by the criminal prosecution of a federal judge.[7] On that occasion, the United States Court of Appeals for the Seventh Circuit decided that contentions similar to those made by appellant here were without merit. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). We are persuaded that *Isaacs* contains the correct statement of the law.

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[6]Under the impeachment articles of the Constitution, all civil officers of the United States are subject to impeachment. Art. II, § 4. It is beyond question that federal judges are included within the term "civil officers." Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 92-82, 92nd Cong., 2d Sess. 574-75 (1973) (hereinafter "Annotated Constitution").

[7]In addition to this case, there have been three other instances of criminal proceedings brought against active federal judges. Judge Francis Winslow of the southern district of New York was indicted in 1929 and resigned before trial commenced. Judge John Warren Davis of the third circuit court of appeals was indicted and stood trial twice before resigning in 1941. Neither of these men claimed that they were immune from criminal prosecution prior to impeachment. J. Borkin, *The Corrupt Judge*, 255-56 (1962). Finally, Judge Otto Kerner of the seventh circuit was indicted, tried, and convicted for crimes that he committed before he became a judge. He unsuccessfully raised the immunity issue in the direct appeal from his conviction. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). *See* discussion in text *infra*.

Two federal judges were the subjects of criminal investigation but resigned before formal indictment. J. Borkin, *supra* at 23, 97. Nine federal judges have been impeached and brought to trial before the Senate. Annotated Constitution, *supra* note 6 at 574 n.10.

Appellant's first contention is based upon the literal language of article I, § 3, cl. 7 of the Constitution:

> Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

According to appellant, this clause creates a constitutionally mandated sequence for the prosecution of a federal judge: first, Congress must act to remove him from office, and only then can the article III courts subject him to "trial, judgment and punishment, according to law."

We find no merit in appellant's argument. Rather, we agree with the seventh circuit that this portion of section 3 was intended "to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy." *United States v. Isaacs*, 493 F.2d at 1142.[8] Read in this light, section 3 represents an attempt by the framers to anticipate and respond to questions that might arise regarding the procedural rights of the accused during the impeachment process. Like article III, § 2, cl. 3 which provides that the right to trial by jury does not extend to impeachment proceedings,[9] section 3 serves

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[8] *See also* E. Corwin, *The Constitution* 16 (H. Chase and C. Ducat 14th ed. 1978); I. R. Foster, *Commentaries on the Constitution* 505 (1895). In this respect the framers departed from English practice in which impeachment was a criminal proceeding to which "jeopardy of life or limb" attached. *See* R. Berger, *Impeachment: The Constitutional Problem* 80 (1973).

[9] "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Art. III, §2, cl. 3

to clarify the rights of civil officers accused of high crimes and misdemeanors, not to limit the jurisdiction of article III courts.[10]

Appellant's second argument relies upon the principle of separation of powers. He contends that the courts would be subject to intolerable pressure from the executive if executive officers were allowed to prosecute active federal judges for acts involving the exercise of their judicial power.[11]

Appellant is of course correct that the independence of the judiciary from external pressures is a highly valued element of our constitutional system. *United States v. Will*, 449 U.S. 200, 217-18 (1980). That independence is already protected by *specific* provisions in the Constitution.[12] *See, e.g.*, art. I, §6, cl. 2

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[10]Appellant's argument taken to an extreme would also prohibit officers of the executive branch from seeking to prosecute a member of Congress. *See* discussion in *United States v. Isaacs*, 493 F.2d 1124, 1144 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). By parody of reasoning, a congressman might argue that since the Constitution provides that each house of Congress may expel a member by two-thirds vote, article I, §5, cl. 2, a congressman cannot be indicted or tried until he is expelled. It is, of course, too late in the constitutional day to accept such a proposition. *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980).

Hastings also argues that a criminal conviction would be tantamount to removal from office. Since only Congress can remove a federal judge from office, he contends that a criminal trial is improper. This argument is meritless because it is based upon the false premise that conviction is equivalent to removal from office. *See Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 141-42 (1970) (Black, J., dissenting); *Burton v. United States*, 202 U.S. 344, 369 (1906).

[11]We recognize that Hastings' second argument does not apply with equal force to the conspiracy count of the indictment since that count does not necessarily involve acts in his judicial capacity. *See Braatelien v. United States*, 147 F.2d 888, 895 (8th Cir. 1945).

[12]Article III provides for the establishment of a court system as one of the separate but coordinate branches of the National Government . . . . These

(continued)

(incompatibility clause);[13] art. III, § 1 (life tenure clause)[14] (compensation clause).[15] Additionally, judges enjoy the same protection as do all citizens from vindictive prosecution by officers of the executive branch. *See United States v. Johnson*, 577 F.2d 1304, 1307 (5th Cir. 1978).[16] We are not persuaded that the proposed rule of absolute judicial immunity from federal

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(footnote continued from preceding page)

courts are presided over by judges appointed for life, subject only to removal by impeachment. Their compensation cannot be diminished during their continuance in office. The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government.

United States ex rel. Toth v. Quarles, 350 U.S. 11, 15-16 (1955). *See also United States v. Isaacs*, 493 F.2d 1124, 1144 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974):

With co-equal branches of government, the potential of abuse by any one of them is inherent. However, the system of checks and balances, a free press, and public resentment toward any attempted domination all work to preserve the guaranteed independence of each branch.

[13]No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

Art. I, §6, cl. 2.

[14]The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

Art. III, § 1.

[15]See note 14, *supra*. *See generally United States v. Will*, 449 U.S. 200 (1980).

[16]The district court noted that "the record is totally devoid of any evidence whatsoever to support an allegation that the government's motivation in bringing these criminal charges was vindictive or retaliatory."

criminal prosecution is a necessary complement to the Constitution's explicit protections.[17] Indeed, the miniscule increment in judicial independence that might be derived from the proposed rule would be outweighed by the tremendous harm that the rule would cause to another treasured value of our constitutional system: no man in this country is so high that he is above the law. "It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy." *United States v. Lee*, 106 U.S. 196, 220 (1882). A judge no less than any other man is subject to the processes of the criminal law. *United States v. Isaacs*, 493 F.2d at 1133; *See*

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[17]In addition to the specific safeguards contained in the Constitution, federal and state judges enjoy an absolute common law immunity from *civil* liability for acts committed in their official capacities. *See Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978); *Pierson v. Ray*, 386 U.S. 547, 554 (1967). This immunity is premised upon a calculation that the public benefit derived from the judicial independence created by the immunity outweighs the sacrifice suffered by aggrieved individuals who are deprived of their civil remedies. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 349 (1872); *accord, Pierson v. Ray*, 386 U.S. at 554. This calculation does not operate to create absolute immunity for judges from criminal prosecution. *See O'Shea v. Littleton*, 414 U.S. 488, 503 (1974). A criminal proceeding, unlike a civil action, is not brought to vindicate an individual interest, but rather the public interest in law enforcement. The rule of absolute immunity from criminal prosecution of active federal judges for acts committed in their official capacities poses too great a threat to the public interest in the rule of law to be adopted by this court. *See* discussion in text *infra*. *Cf. Dennis v. Sparks*, 449 U.S. 24, 28 n.5 (1980) (state judge who is immune from civil liability is not immune from criminal liability).

We note that this is not a case in which a judge is prosecuted for acts in his official capacity undertaken in good faith. In such a case, there may exist a common law immunity from criminal prosecution. *See Braatelien v. United States*, 147 F.2d 888, 895 (8th Cir. 1945); *Commonwealth v. Tartar*, 239 S.W.2d 265, 266 (Ky. Ct. App. 1951). The existence of this limited immunity would further counsel against the creation of the absolute immunity urged by Hastings.

Dennis v. Sparks, 449 U.S. 24, 28 n.5 (1980); *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974).[18]

We decide today only that appellant may be prosecuted under the instant federal indictment.[19] We conclude that the district court was correct in denying appellant's motion to quash that indictment.[20] We therefore affirm the district court's order and deny the petition for writs. Let the mandate issue forthwith.

The interlocutory order of the district court is AFFIRMED; the petition for writs of mandamus and prohibition is DENIED.

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[18]*See also Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 140 (1979) (Douglas, J., dissenting); *id.* at 141-142 (Black, J., dissenting); *Braatelien v. United States*, 147 F.2d 888, 895 (8th Cir. 1945); *Strawbridge v. Bednarik*, 460 F. Supp. 1171, 1173 (E.D. Pa. 1978); *Shore v. Howard*, 414 F. Supp. 379, 385 (N.D. Tex. 1976).

[19]We do not address whether or under what circumstances an extended sentence of imprisonment might approach in substance removal from office.

[20]Hastings makes an additional argument that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372, includes a determination by Congress that active federal judges may not be prosecuted by officers of the executive. We find this argument to be totally devoid of merit. We similarly fail to find any merit in his argument that judges of the federal courts are incapable of treating his case in an impartial fashion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
	)	Case No.
v.		81-596-Cr-ETG
	)	
WILLIAM A. BORDERS, JR., and ALCEE L. HASTINGS	)	

TRANSCRIPT OF PROCEEDINGS AT HEARING ON DEFENDANTS' NON-EVIDENTIARY PRETRIAL MOTIONS

Pursuant to notice, the above-entitled matter came on for hearing before Hon. Edward T. Gignoux, Chief Judge, United States District Court, District of Maine, sitting as a District Court Judge in the Southern District of Florida by designation of the Chief Justice, at the United States Courthouse, Miami, Florida, on Wednesday, February 17, 1982, which proceedings were as follows:

* * *

THE COURT: The matter before the Court is the motion of the Defendant Alcee L. Hastings to quash the indictment and to dismiss this proceeding for lack of jurisdiction. The Court has received and had the benefit of competent briefing by counsel for that defendant and counsel for the United States and of the oral arguments which the Court has just heard. The Court has had the benefit of completing its own research and particularly of reference to the only appellate decision — the only court decision — treating of the question here presented which is, of

course, the opinion of the United States Court of Appeals for the Seventh Circuit in the case involving United States Circuit Judge Kerner, *U.S. v. Isaacs*, 493 F.2d 1124, 1140-44 (7th Cir.), *cert. den.*, 417 U.S. 976 (1974).

The Court will be filing, within the next few days, a memorandum opinion setting forth its views. For present purposes, the Court will state simply that it is persuaded, as was the United States Court of Appeals for the Seventh Circuit, that the United States Constitution does not forbid the trial of a Federal Judge for criminal offenses committed either before or after the assumption by him of judicial office and that this Court has jurisdiction to try the defendant in the present case. The Court recognizes that the — so far as the research of counsel and the Court's own research discloses — this is the first instance in which a sitting Federal Judge has been criminally prosecuted for acts alleged to have been committed in the course of discharging his official duty.

In the *Isaacs* case, the criminal conduct with which Judge Kerner was charged did not involve the performance of his official acts as a Judge. The Court of Appeals in that case, however, squarely held that the Constitution does not prohibit the criminal prosecution of a Federal Judge prior to his impeachment, and, as indicated, for reasons which the Court will set out more fully in the memorandum which will be filed within the next several days, this Court agrees. The instant motion is denied. The Court will enter, during the course of the day, a brief order denying the motion for reasons to be set forth in the memorandum opinion which will be filed. This is a question, a constitutional question which, as the Court has indicated, has not been resolved by any — by the United States Supreme Court, which is, of course, the final arbiter. The Court senses that the order which the Court will be entering today is an order, or will be an order, which is appealable as an interlocutory

appeal under the analogy to the Cohen doctrine, most recently discussed by the United States Supreme Court in *Helstoski v. Meanor,* 442 U.S. 500 (1979). In the event this order is to be appealed, the Court's understanding is the appeal period is 10 days. If an appeal is to be taken at this time, the Court will change the general character of the case.

* * *

THE COURT: The order denying the Defendant Hastings' motion to quash the indictment and dismiss the proceedings for lack of jurisdiction will be entered following this 10-minute recess. The memorandum opinion, which is in draft form, predicated upon the very splendid briefs, and so forth, will be filed some time next week. Essentially, as Professor Anderson is undoubtedly aware, the analysis of the *Isaacs* case is, in this Court's view, persuasive, but the Court does recognize that the Supreme Court of the United States will have the final say and that Court has disagreed with this Court on a limited number of occasions, but that's probably only because many of my rulings don't reach the Supreme Court of the United States.

* * *

CERTIFICATE

I hereby certify that the foregoing is a true and complete transcript of the proceedings above described, all of said proceedings having been reported verbatim by me on the date indicated heretofore.

/s/ Harry B. Derry

OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	:	
Plaintiff:	:	
v.	:	Case No. 81-596-Cr-ETG
WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS,	:	
Defendants:	:	

ORDER DENYING HASTINGS' MOTION TO QUASH INDICTMENT AND DISMISS PROCEEDINGS FOR LACK OF JURISDICTION

Hearing having been had this date upon defendant Hastings' motion to quash indictment and dismiss proceedings for lack of jurisdiction; and the United States having been represented by its counsel, Reid H. Weingarten, Esq., and Robert I. Richter, Esq., United States Department of Justice, Criminal Division, Public Integrity Section, Washington, D.C.; and defendant having been represented by his counsel, Joel Hirschhorn, Esq., Miami, William Waterman, Esq., Pontiac, Michigan, and Terence J. Anderson, Esq., Coral Gables, Florida (as counsel to Joel Hirschhorn, Esq.); and the Court having considered the written and oral arguments of counsel; for the reasons set forth in the Memorandum Opinion to be filed herewith, it is

ORDERED that defendant's motion to quash indictment and to dismiss proceedings for lack of jurisdiction is DENIED.

Dated at Miami, Florida, this 17th day of February 1982.

/s/ Edward T. Gignoux

United States District Judge
Serving by designation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	:	
Plaintiff:	:	
v.	:	Case No. 81-596-Cr-ETG
WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS, Defendants:	:	

MEMORANDUM OPINION TO ACCOMPANY ORDER DENYING DEFENDANT HASTINGS' MOTION TO QUASH INDICTMENT AND DISMISS PROCEEDINGS FOR LACK OF JURISDICTION

On December 29, 1981 a four-count indictment was returned against Alcee L. Hastings, a United States District Judge for the Southern District of Florida, and William A. Borders, Jr., an attorney in Washington, D.C. Counts I and II of the indictment charge the two defendants with conspiracy to solicit bribes, 18 U.S.C. §§201(c), 371 (Count I), and obstruction of justice, 18 U.S.C. §1503 (Count II).[1] Hastings has filed a motion to quash the indictment and to dismiss the proceedings against him on the ground "that the Grand Jury lacked jurisdiction to indict jurisdiction to try him for offenses of the nature charged." His contention is that the Constitution prohibits the criminal pro-

[1]Counts III and IV charge Borders alone with violations of the Travel Act, 18 U.S.C. § 1952.

secution of a federal judge for acts relating to his conduct as a judge prior to his removal from office by impeachment or resignation. He argues that both the text of the Constitution, in particular, art. I, § 3, cl. 7;[2] art. II, § 4;[3] and art. III, § 1,[4] and the principle of separation of powers compel the conclusion that a federal judge must be removed from office by impeachment or resignation before he can be criminally prosecuted.

So far as the research of the Court and counsel discloses, this is the first instance in which a sitting federal judge has been criminally prosecuted for acts alleged to have been committed in connection with the performance of his judicial duties. However, in *United States v. Isaacs*, 493 F.2d 1124, 1140-44 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), a special panel of the United States Court of Appeals for the Seventh Circuit addressed the question of whether a sitting federal judge can be criminally prosecuted. Although in that instance the judge, United States Circuit Judge Otto Kerner, Jr., was charged with

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[2]Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

U.S. Const. art. I, § 3, cl. 7.

[3]The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

U.S. Const. art. II, § 4.

[4]The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior. . . .

U.S. Const. art. III, § 1.

[5]No such prosecutorial misconduct is alleged in this case and, indeed, defendant concedes that his motion does not "challenge the government's conduct in the investigation and decision to seek and prosecute this indictment." Defendant's Memorandum at 3, n.1.

criminal conduct which was not related to the performance of his official acts as a judge, the court squarely held that "[t]he Constitution does not forbid the trial of a federal judge for criminal offenses committed either before or after the assumption of judicial office." *Id.* at 1142. The *Isaacs* court comprehensively analyzed and flatly rejected both of the constitutional arguments made by defendant in the present case. *Id.* at 1140-44. The court concluded:

> On the basis of the text of the Constitution, its background, its contemporaneous construction, and the pragmatic consequences of its provisions on impeachment, we are convinced that a federal judge is subject to indictment and trial before impeachment and that the district court had jurisdiction to try defendant Kerner.

Id. at 1144. This Court fully concurs with the analysis and conclusion of the *Isaacs* court that there is no constitutional bar to the criminal prosecution of a sitting federal judge.

Only one further comment is necessary. Defendant contends that the present case "presents a much narrower issue" than *Isaacs*. He points out that defendant "has exercised the judicial power adversely to positions asserted by the executive branch in several controversial cases," and suggests that a much greater threat is posed to the independence of the judiciary in the present case than in *Isaacs*. The short answer to this argument is that the record is totally devoid of any evidence whatsoever to support an allegation that the government's motivation in bringing these criminal charges was vindictive or retaliatory.[5] Moreover, the potential for abuse by the executive branch of its power to initiate prosecutions cannot justify insulating members of the judicial branch from prosecution for violation of the criminal laws, particularly in view of the other mechanisms which exist for dealing with any such abuse, should it occur. *See, e.g., United States v. Johnson*, 577 F.2d 1304, 1308 (5th

Cir. 1978); *United States v. Myers*, 635 F.2d 932, 940-41 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980). As the *Isaacs* court observed:

> With co-equal branches of government, the potential of abuse by any of them is inherent. However, the system of checks and balances, a free press, and public resentment toward any attempted domination all work to preserve the guaranteed independence of each branch.

United States v. Isaacs, supra, 493 F.2d at 1144. *See also United States v. Brewster*, 408 U.S. 501, 521-25, 522 n.16 (1972).

The Court holds that the grand jury had jurisdiction to indict and this Court has jurisdiction to try defendant Hastings for the offenses charged in the present indictment. An order has been entered denying defendant's motion to quash indictment and dismiss proceedings for lack of jurisdiction.

Dated this 25th day of February 1982.

/s/ Edward T. Gignoux

United States District Judge
Serving by designation

APPENDIX C

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 82-5262
D.C. Docket No. 81-596-CR-ETG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HONORABLE ALCEE L. HASTINGS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

No. 82-5715

IN RE:

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE IN AND FOR
THE SOUTHERN DISTRICT OF FLORIDA,

Petitioner.

Petition for Writs of Mandamus and Prohibition

Before VANCE and ANDERSON, Circuit Judges, and ALLGOOD*, District Judge

*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED.

July 12, 1982

A True Copy
Attested
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Issued as Mandate JUL 12, 1982
Atlanta, Georgia

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5262

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HONORABLE ALCEE L. HASTINGS,

Defendant-Appellant.

No. 82-5715

IN RE: HONORABLE ALCEE L. HASTINGS,

Petitioner.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion *U.S. v. HASTINGS*, 11 Cir., 1982, 681 F.2d 706).

(SEPTEMBER 22, 1982)

Before VANCE and ANDERSON, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ ROBERT S. VANCE

United States Circuit Judge

*Hon. Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	)
Plaintiff,	) CRIMINAL NO. 81-596-CR-ETG
v.	) Violations of 18 U.S.C. 371 (conspiracy); 18 U.S.C. 1503 (obstruction of justice);
WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS,	) 18 U.S.C. 2 (aiding and abetting); 18 U.S.C. 1952 (Travel Act)
Defendants.	)

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

1. From on or about September 10, 1981 until October 9, 1981 and at all times pertinent to this indictment, WILLIAM A. BORDERS, JR., defendant herein, was an attorney living in Washington, D.C.

2. From on or about September 10, 1981 until October 9, 1981 and at all times pertinent to this indictment, ALCEE L. HASTINGS, defendant herein, was a United States District Court Judge in the Southern District of Florida.

3. At all times pertinent to this indictment, Paul Rico, a retired agent of the Federal Bureau of Investigation, acted in an undercover capacity for the Government and posed as Frank Romano, who, along with his brother, Thomas Romano, had been convicted by a jury on December 23, 1980 of racketeering charges after a trial before defendant ALCEE L. HASTINGS and had been sentenced by defendant ALCEE L. HASTINGS on July 8, 1981.

4. Beginning on or about September 10, 1981 (the exact date being unknown to the Grand Jury) and continuing until on or about October 9, 1981, in the Southern District of Florida and elsewhere, defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS did willfully and knowingly combine, conspire, confederate and agree together to:

(a) violate Title 18, United States Code, Section 201(c), to wit: the defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS did conspire and agree together corruptly to ask, solicit, seek, accept, receive and agree to receive, directly or indirectly, a sum of money for themselves in return for defendant ALCEE L. HASTINGS being influenced in his performance of official acts as a United States District Judge; and

(b) defraud the United States of America and the people of the United States in connection with the performance of lawful governmental functions:

(1) of and concerning the right of the United States and its citizens to have the lawful functions of the federal judiciary exercised and administered free from corruption, conflict of interest, fraud and obstruction;

(2) of and concerning the right of the United States and its citizens to the conscientious, faithful, disinterested and unbiased judgments and actions of the defendant ALCEE L. HASTINGS as a United States District Court Judge, free from

fraud, corruption, partiality, dishonesty, conflict of interest, and improper influences.

5. It was an object of the conspiracy that defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS would agree to receive money from criminal defendants who appeared before Judge Hastings in return for promises that Judge Hastings would perform acts in his official capacity on behalf of said criminal defendants.

6. It was also an object of the conspiracy that defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS would perform and promise to perform acts to affect cases that were before defendant ALCEE L. HASTINGS, including defendant ALCEE L. HASTINGS making legal rulings and WILLIAM A. BORDERS, JR. giving directions to criminal defendants whom he did not represent, all acts done to facilitate improper payments made by these criminal defendants to defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS.

7. It was part of said conspiracy that defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS would receive $150,000 from someone they believed to be Frank Romano, in return for Judge Hastings reducing the sentences he had previously imposed against the Romano brothers.

8. It was further part of said conspiracy that defendant WILLIAM A. BORDERS, JR. would meet with someone he believed to be Frank Romano, and set the terms of the $150,000 payment.

9. It was further part of said conspiracy between the defendants that the terms of the $150,000 payment would be as follows:

(a) Defendant ALCEE L. HASTINGS would have dinner at 8:00 p.m. on September 16, 1981 at a restaurant in the Miami area selected by the Romanos as proof of defendant

ALCEE L. HASTINGS' participation in the bribery scheme;

(b) The Romanos would make an "up front" payment to defendant WILLIAM A. BORDERS, JR. on September 19, 1981 as demonstration of their good faith;

(c) Defendant ALCEE L. HASTINGS would issue an order returning a substantial portion of property owned by the Romano brothers that defendant ALCEE L. HASTINGS had ordered forfeited as part of the criminal penalties imposed against the Romano brothers;

(d) The Romanos would pay the remaining portion of the $150,000 payment;

(e) The Romanos would file a motion to mitigate the three-year prison sentences that had been imposed against them on July 8, 1981 by defendant ALCEE L. HASTINGS; and

(f) Defendant ALCEE L. HASTINGS would re-sentence the Romanos and eliminate the prison sentences he had originally imposed against them.

OVERT ACTS

In furtherance of the conspiracy, the following overt acts, among others, were committed:

1. On or about September 12, 1981, in the Southern District of Florida, defendant WILLIAM A. BORDERS, JR. met with Paul Rico, posing as Frank Romano, and discussed the $150,000 bribe that would be paid to reduce the sentences that had been imposed by defendant ALCEE L. HASTINGS against the Romano brothers.

2. On or about September 16, 1981, in the Southern District of Florida, defendant ALCEE L. HASTINGS had dinner at the Fontainbleu Hotel on Miami Beach.

3. On or about September 19, 1981, in the Southern District of Florida, defendant WILLIAM A. BORDERS, JR. received $25,000 from Paul Rico, posing as Frank Romano, as good faith "up front" money of the $150,000 payoff.

4. On or about October 6, 1981, in the Southern District of Florida, defendant ALCEE L. HASTINGS issued an order in which he ordered the return of a substantial portion of property belonging to the Romano brothers that he had previously ordered forfeited.

5. On or about October 7, 1981, defendant WILLIAM A. BORDERS, JR. telephoned Paul Rico, posing as Frank Romano, in the Southern District of Florida and requested that Rico come to Washington, D.C. to pay him the remaining $125,000 of the bribe.

6. On or about October 9, 1981, defendant WILLIAM A. BORDERS, JR. met with Paul Rico at a motel in Arlington, Virginia to receive the remaining $125,000 of the bribe.

(In violation of Title 18, United States Code, Section 371)

COUNT II

1. The allegations of paragraphs one through three of this Indictment are realleged herein as though fully set forth.

2. From on or about September 10, 1981 (the exact date being unknown to the Grand Jury) and continuing until October 9, 1981 in the Southern District of Florida and elsewhere, the defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS, acting unlawfully, willfully and knowingly and aiding and abetting each other, did corruptly influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice in that during the aforesaid period of time:

(a) Defendant ALCEE L. HASTINGS did disclose to defendant WILLIAM A. BORDERS, JR. the substance of a judicial order in the case captioned *United States v. Romano*, 78-364-CR-ALH, that had not yet been issued by defendant ALCEE L. HASTINGS;

(b) Defendant ALCEE L. HASTINGS did give to defendant WILLIAM A. BORDERS, JR. advance notice as to when a judicial order in the case captioned *United States v. Romano*, 78-364-CR-ALH, would be issued;

(c) Defendant ALCEE L. HASTINGS did issue an order in the case captioned *United States v. Romano*, 78-364-CR-ALH, wherein the content and timing of said order were consistent with the information defendant ALCEE L. HASTINGS had previously given to defendant WILLIAM A. BORDERS, JR.;

(d) Defendant WILLIAM A. BORDERS, JR. did reveal to an individual be believed to be a defendant in the case captioned *United States v. Romano*, 78-364-CR-ALH, information that had been disclosed to him by defendant ALCEE L. HASTINGS and described in paragraphs (a) and (b) of this Count; and

(e) Defendant WILLIAM A. BORDERS, JR. did instruct an individual he believed to be a defendant in the case captioned *United States v. Romano*, 78-364-CR-ALH, while not representing that individual and knowing that individual to have an attorney, to take various steps, including withdrawing his appeal to the Fifth Circuit, with all said acts done by defendants ALCEE L. HASTINGS and WILLIAM A. BORDERS, JR. to manipulate and interfere with the judicial process in the case captioned *United States v. Romano*, 78-364-CR-ALH, for the purpose of advancing their own private interests.

(In violation of Title 18, United States Code, Section 1503 and 2)

COUNT III

1. The allegations of paragraphs one through three of this Indictment are realleged herein as though fully set forth.

2. On or about September 11 and 12, 1981, within the Southern District of Florida and elsewhere, the defendant WILLIAM A. BORDERS, JR. did unlawfully, willfully and knowingly travel in interstate commerce from the District of Columbia through the State of Virginia and into the Southern District of Florida with the intent to promote, establish, carry on and facilitate the promotion, establishment, and carrying on of unlawful activity, said unlawful activity being bribery, in violation of Title 18, United States Code, Section 201, and the defendant WILLIAM A. BORDERS, JR. did thereafter perform and attempt to perform acts to promote, carry on and facilitate the promotion and carrying on of said unlawful activity.

(In violation of Title 18, United States Code, Section 1952)

COUNT IV

1. The allegations of paragraphs one through three of this Indictment are realleged herein as though fully set forth.

2. On or about September 18 and 19, 1981, within the Southern District of Florida and elsewhere, the defendant WILLIAM A. BORDERS, JR. did unlawfully, willfully and knowingly travel in interstate commerce from the District of Columbia through the State of Virginia and into the Southern District of Florida with the intent to promote, establish, carry on and facilitate the promotion, establishment, and carrying on of unlawful activity, said unlawful activity being bribery, in violation of Title 18, United States Code, Section 201, and the defendant WILLIAM A. BORDERS, JR. did thereafter perform and attempt to perform acts to promote, carry on and facilitate the promotion and carrying on of said unlawful activity.

(In violation of Title 18, United States Code, Section 1952)

A TRUE BILL

/s/ Joan B. Gray

FOREMAN

/s/ Gerald E. McDowell

GERALD E. McDOWELL, Chief
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/s/ Reid H. Weingarten

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U.S. Department of Justice

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States

ARTICLE I.

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2, clause 5.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3, clause 6.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Section 3, clause 7.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

ARTICLE II.

Section 1, clause 1.

> The executive Power shall be vested in a President of the United States of America. . . .

Section 2, clause 1.

> The President shall * * * have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Section 2, clause 2.

> . . . [H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. . . .

Section 3.

> . . . He shall take Care that the Laws be faithfully executed, ...

Section 4.

> The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

Section 1.

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and

inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2, clause 1.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 3, clause 3.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . . .

United States Code

Title 28

§372. Retirement for disability; substitute judge on failure to retire; judicial discipline

(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may —

(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

(B) conclude the proceeding if he finds that appropriate corrective action has been taken.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly —

(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehen-

sive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council —

(A) may conduct any additional investigation which it considers to be necessary;

(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

(v) censuring or reprimanding such judge or magistrate by means of private communication;

(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge ap-

pointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 153 of this title; and

(C) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct —

(i) which might constitute one or more grounds for impeachment under article I of the Constitution; or

(ii) which, in the interest of justice, is not amenable to resolution by the judicial council,

the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

(8) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional in-

vestigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.

(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that —

(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference.

(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.

(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

(14) All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding unless —

(A) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by

resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(B) authorized in writing by the judge or magistrate who is the subject to the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

(15) Each written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

(16) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

(17) The Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.

(As amended Oct. 10, 1980, Pub. L. 96-417, title V, § 501(9), 94 Stat. 1742; Oct. 15, 1980, Pub. L. 96-458, § 3(a), (b), 94 Stat. 2036, 2040.)
28 U.S.C. §372(c) (Supp. IV 1981)

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

* * *

(4)He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

* * *

28 U.S.C. §455 (1976 & Supp. IV 1981)